S Subramaniam a/l Shanmugam v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–38 OF 2000
MOHD GHAZALI J
22 OCTOBER 2002

Criminal Procedure *— Appeal — Conviction and sentence, against — Accused convicted of offence of fabricating false evidence — Whether trial judge carried out maximum evaluation of evidence adduced by prosecution — Whether trial judge viewed evidence adduced by prosecution objectively before calling on appellant to enter his defence*

Criminal Procedure *— Charge — Alteration or amendment of — Trial judge dismissed accused's application to recall witnesses after amendment of charge — Whether trial judge was wrong — Whether miscarriage of justice occasioned — Whether s 162 of Criminal Procedure Code was mandatory — Whether trial vitiated as a result of trial judge's refusal to allow accused to recall witnesses*

The appellant was charged with an offence under s 193 of the Penal Code for giving false evidence in the form of an affidavit sworn by the appellant and filed in the High Court for the purpose of being used in a civil suit against one TI. In the affidavit, the appellant stated that he did personally serve a writ of summons relating to the said civil suit on TI at or about 11.45am on 30 January 1987 and it was the prosecution's case that this was false. TI contended that the writ of summons was never served on him and that he had never met the appellant before the trial. At the close of the prosecution's case, the sessions court judge found that the prosecution had proven its case beyond a reasonable doubt and ordered the appellant to enter his defence. At the close of the defence's case, the sessions court judge amended the charge pursuant to s 158 of the Criminal Procedure Code to one of fabricating false evidence as described in s 192 of the Code. The amended charge was read and explained to the appellant and he maintained his plea of not guilty. The appellant requested that he be allowed to recall witnesses but that application was turned down. The sessions court judge then went on to find the appellant guilty of the charge as amended and sentenced his to ten months' imprisonment. This was the appellant's appeal against the conviction and the sentence.

Held, allowing the appeal:

(1) The notes of proceedings did not show that the sessions court judge viewed the evidence adduced by the prosecution objectively before calling on the appellant to enter his defence. His notes also did not show that he had conducted a maximum evaluation of the evidence adduced by the prosecution before ruling that the prosecution had established the charge against the appellant beyond a reasonable doubt (which was the standard of proof required of the prosecution at that time) (see p 166G–I).

(2) There were inconsistencies with regard to the whereabouts of TI on the morning of 30 January 1987. The sessions court judge's grounds of decision did not seem to reflect that the sessions court judge had observed such inconsistencies before finding the appellant guilty on the amended charge (see p 167A–B).

(3) The original charge framed against the appellant was erroneous because it stated that on 13 April 1987 at the High Court in Kuala Lumpur, the appellant gave false evidence (in an affidavit sworn by the appellant) for the purpose of it being used in the civil suit against TI. As can be seen, the affidavit was sworn by the appellant on 4 April 1987 and not 13 April 1987 although it was filed in court on 13 April 1987. Under the circumstances, the sessions court judge should not have called upon the appellant to enter on his defence (see pp 169D–E, 170A–C).

(4) The summary dismissal of the application by the appellant's counsel to recall witnesses was wrong and had occasioned a miscarriage of justice. Section 162 of the CPC was a mandatory provision in that the accused shall be allowed to recall any witnesses. Since it was a mandatory provision, the trial was vitiated as a result of the sessions court judge's refusal to allow the appellant to recall the witnesses without inquiring into the reason for the application (see pp 172C–E, 173C).

(5) Accordingly, the conviction was set aside and the appellant acquitted and discharged (see p 173A).

[Bahasa Malaysia summary

Perayu dituduh dengan satu kesalahan di bawah s 193 Kanun Keseksaan kerana memberi keterangan palsu dalam bentuk afidavit yang disumpah oleh perayu dan difail di Mahkamah Tinggi untuk tujuan diguna dalam guaman sivil terhadap seorang bernama TI. Dalam afidavit, perayu menyatakan bahawa beliau sendiri menyampaikan satu writ saman berhubung dengan guaman sivil tersebut ke atas TI pada atau kira-kira pada pukul 11.45 pada 30 Januari 1987 dan ia merupakan kes pihak pendakwaan bahawa ini adalah palsu. TI berhujah bahawa writ saman tidak pernah diserahkan ke atasnya dan bahawa dia tidak pernah bertemu perayu sebelum perbicaraan. Di penghujung kes pihak pendakwaan, hakim mahkamah sesyen mendapati bahawa pihak pendakwaan telah membukti kesnya melampaui keraguan munasabah dan memerintah perayu memasukkan pembelaannya. Di penghujung kes pihak pembelaan, hakim mahkamah sesyen meminda tuduhan menurut s 158 Kanun Acara Jenayah kepada satu atas memalsukan keterangan seperti yang disifatkan dalam s 192 Kanun tersebut. Tuduhan terpinda dibaca dan dijelaskan kepada perayu dan beliau mengekalkan rayuan tidak bersalah. Perayu meminta supaya dibenarkan memanggil semula saksi-saksi tetapi permohonan itu ditolak. Hakim mahkamah sesyen

kemudiannya mendapati perayu bersalah atas tuduhan seperti yang terpinda dan menjatuhkan hukuman penjara selama 10 bulan. Ini merupakan rayuan perayu terhadap sabitan dan hukuman.

Diputuskan, membenarkan rayuan:

(1) Nota-nota prosiding tidak menunjukkan bahawa hakim mahkamah sesyen menimbang keterangan yang dikemukakan oleh pihak pendakwaan secara objektif sebelum memanggil perayu memasukkan pembelaannya. Nota beliau juga tidak menunjukkan bahawa beliau telah menjalankan penilaian maksima ke atas keterangan yang dikemukakan oleh pihak pendakwaan sebelum memutuskan bahawa pihak pendakwaan telah membuktikan tuduhan terhadap perayu melampaui keraguan munasabah (yang merupakan darjat membukti yang dikehendaki ke atas pihak pendakwaan pada masa itu) (lihat ms 166G–I).

(2) Wujudnya percanggahan tentang di manakah TI berada pada pagi 30 Januari 1987. Alasan keputusan hakim mahkamah sesyen seolah-olah tidak membayangkan bahawa beliau telah meneliti percanggahan demikian sebelum mendapati perayu bersalah atas tuduhan terpinda (lihat ms 167A–B).

(3) Tuduhan asal yang dibentuk terhadap perayu terkhilaf kerana ia menyatakan bahawa pada 13 April 1987 di Mahkamah Tinggi Kuala Lumpur, perayu memberi keterangan palsu (dalam afidavit yang disumpah oleh perayu) untuk tujuan digunakan dalam guaman sivil terhadap TI. Seperti yang dapat dilihat, afidavit disumpah oleh perayu pada 4 April 1987 dan bukannya pada 13 April 1987 walaupun ia difail di mahkamah pada 13 April 1987. Di bawah keadaan ini, hakim mahkamah sesyen tidak seharusnya memanggil perayu memasukkan pembelaannya (lihat ms 169D–E, 170A–C).

(4) Penolakan terus permohonan oleh peguam perayu untuk memanggil semula saksi-saksi adalah salah dan telah menyebabkan kegagalan keadilan. Seksyen 162 KAJ adalah satu peruntukan mandatori dalam ertikata tertuduh hendaklah dibenarkan memanggil semula mana-mana saksi. Oleh kerana ia adalah satu peruntukan mandatori perbicaraan dilemahkan akibat keengganan hakim mahkamah sesyen untuk membenar perayu memanggil semula saksi-saksi tanpa menyelidik alasan untuk permohonan (lihat ms 172C–E, 173C).

(5) Dengan itu, sabitan diketepikan dan perayu dibebas dan dilepaskan (lihat ms 173A).]

Notes

For cases on alteration or amendment of charge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 792–856.

For cases on appeal against conviction and sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 221–231.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Baban Singh v Jagdish Singh AIR 1967 Cri LJ 6 (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (folld)
Oh Keng Seng v PP [1976] 1 MLJ 143 (refd)
PP v Tan Kim Kang & Ors [1962] MLJ 388 (folld)

Legislation referred to

Criminal Procedure Code ss 158, 162, 261
Penal Code ss 191, 192, 193
Penal Code [India] ss 191, 192, 199
Rules of the High Court 1980 O 12 r 4, O 13 r 1(1)

Appeal from: Case No 3–62–111 of 1997 (Sessions Court, Kuala Lumpur)

Ranjit Singh (*K Ranjit Singh & Partners*) for the appellant.
Ahmad Bache (Deputy Public Prosecutor), Attorney General's Chambers) for the respondent.

Mohd Ghazali J: The appellant was charged with an offence under s 193 of the Penal Code ('the Code'). The main charge against the appellant read as follows:

Pertuduhan

Bahawa kamu pada 13 April 1987 di Mahkamah Tinggi (1) Bahagian Dagang Kuala Lumpur di dalam Wilayah Persekutuan, telah memberi keterangan palsu dengan niat untuk digunakan dalam prosiding Sivil Guaman No C1–23–3323–86, di mana keterangan palsu tersebut telah dibuat dalam suatu afidavit yang diikrar oleh kamu dan didaftarkan di mahkamah tersebut dan kamu telah menyatakan dalam afidavit tersebut perkataan-perkataan yang digariskan dalam lampiran A2 yang dilampirkan bersama dan perkataan-perkataan yang digariskan tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah cabang pertama kepada seksyen 193 Kanun Keseksaan.

An alternative charge was also preferred against the appellant and it read:

Pertuduhan pilihan

Bahawa kamu pada 13 April 1987 di Mahkamah Tinggi (1) Bahagian Dagang Kuala Lumpur di dalam Wilayah Persekutuan, dalam sebuah akuan yang dibuat oleh kamu yang boleh diterima disisi undang-undang oleh mahkamah tersebut sebagai keterangan iaitu satu afidavit yang didaftarkan di mahkamah tersebut, telah membuat pernyataan palsu dalam afidavit tersebut

A sepertimana yang digariskan dalam lampiran A2 yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan afidavit tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu, kamu telah melakukan satu kesalahan di bawah s 199 Kanun Keseksaan yang boleh dihukum di bawah cabang pertama kepada seksyen 193 Kanun B Keseksaan.

The background to the main charge and the alternative charge being preferred against the appellant is as follows:

By writ of summons dated 7 October 1986, one Yew Chin Eng @ Yew Chee Ying ('the plaintiff') sued one Ibrahim bin Mohd Said ('the first C defendant') and one Tengku Iskandar bin Tengku Ahmad ('the second defendant') ('SP3') for the sum of RM650,000. Solicitors for the plaintiff, Messrs Murthi & Partners, filed the action on 9 October 1986 in the High Court, Kuala Lumpur. The suit was registered as Civil Suit No C1 23–3323–86.

D On 13 April 1987, Messrs Murthi & Partners filed an affidavit of service of the writ of summons on SP3 ('exh P3') which was affirmed by the appellant on 4 April 1987 before one K Murugappan, Commissioner of Oaths ('SP2') whose place of business is at No 38, Jalan Dato Hamzah, Klang. It read:

E I was entrusted with the service of the writ of summons on the abovenamed second defendant at the instructions of M/s Murthi & Partners of No 9B, Jalan Station, 41000 Klang, Selangor, solicitors of the plaintiff, Yew Chin Eng @ Yew Chee Ying.

2 I did on Monday 30 January 1987 at 11.45 in the morning at the second defendant's office at Room 9, 4th Floor, Bangunan LUTH, Jalan Dato F Pati, Kota Bahru, Kelantan. I personally served on the defendant with a true copy of the writ of summons which appeared to me, to have been regularly issued out of the Registrar of the High Court, Kuala Lumpur against the defendants in the abovenamed suit by the abovenamed plaintiff, Yew Chin Eng @ Yew Chee Ying dated 9 October 1986.

3 The said second defendant admitted to me that he was the second G defendant. However he did not accept the service of the Writ of Summons.

4 I left a copy of the writ of summons near him.

5 I did on Monday, 30 January 1987 at 11.55 in the morning indorsed on the sealed copy of the writ of summons, the day of the month and week of the said service on the second defendant.

H

6 Annexed hereto and marked, 'SS I' is a sealed copy of the writ of summons with my own endorsement of service.

The endorsement on the back of the writ of summons which is in the appellant's handwriting read:

I I, S Subramaniam (NRIC No 5759116) did on Monday, 30 January 1987 personally serve the second defendant, Tengku Iskandar bin Tengku Ahmad, at 11.45am with the true copy of the writ of summons at his office, Room 9,

4th Floor, Bangunan LUTH, Jalan Dato Pati, Kota Bahru, Kelantan and endorsed at the back of this writ of summons at 11.50am. A
(Signed)
11.50 am

On the same date, ie 13 April 1987, on the basis that SP3 failed to enter appearance after the time limited for appearing, the plantiff entered final judgment against him. The order relating to the final judgment read: B

JUDGMENT

No appearance having been entered by the second defendant herein IT IS THIS ADJUDGED that the second defendant do pay the plaintiff the sum of RM650,000 (Ringgit Six Hundred and Fifty Thousand only) together with interest at the rate of 8% pa from 3 May 1985 to the date of realization and C the sum of $225 as cost.

Dated 13 April 1987.

(Signed)
SENIOR ASSISTANT REGISTRAR
HIGH COURT
KUALA LUMPUR D

The plaintiff subsequently commenced bankruptcy proceedings against SP3 and on 27 September 1990 a receiving order and an order of adjudication were made against the latter.

On 12 September 1996, about six years later after he was adjudicated a bankrupt, SP3 lodged a police report ('exh P4') upon being 'informed' that E Messrs Murthi & Partners, 'which made him a bankrupt', used an affidavit of service which contained a false statement. The appellant was subsequently arrested and charged.

At the trial in the sessions court, SP3 contended that the writ of summons was never served on him and that he has never met the appellant F nor seen him before the trial. He agreed that the address where the appellant allegedly served the writ of summons on him was his office but contended it was closed that day, viz 30 January 1987, it being a Friday and hence a public holiday in Kelantan. Furthermore it was the second day of Chinese New Year. He then insisted that his diary ('exh P5') shows that on 30 January 1987 he was, at his house in Pasir Mas. On that day his friend, G one Ramli bin Ahmad ('SP4') came to his house in the morning. He then went for Friday prayers and returned home where he waited for one Pengiran Sufri, an acquaintance from overseas. Upon his arrival they went to Thailand.

In his evidence SP4 stated he was at SP3's house between 9am and 5pm H on 30 January 1987. After Friday prayers he had lunch with SP3 at the latter's house. At about 3pm that day one Jeffri, an overseas acquaintance of SP3, came to the said house and they then went to Rantau Panjang. They returned after 5pm.

SP5, an acquaintance of SP3, stated that sometime in June 1995 he came to know from the newspapers that SP3 was made a bankrupt. He I managed to see one MS Murthi ('SP6') of Messrs Murthi & Partners and was shown the cause papers relating to the said civil suit and the bankruptcy

A proceedings against SP3. He later made a visit to the High Court situated in Wisma Denmark, Kuala Lumpur and managed to obtain copies of the relevant cause papers and a copy of the said affidavit of service sworn by the appellant. He then noticed that the appellant had stated therein that the writ of summons was served on Monday, 30 January 1987 whereas his computer calendar show that that day was a Friday. He also noticed that the B endorsement made by the appellant at the back of the writ of summons referred to that date as being a Monday. He later gave copies of the said cause papers to SP3 for his information. When he paid SP3 a visit, SP3 checked his diary ('exh P5') and informed him that on 30 January 1987 he was not in Kota Bharu.

C SP6 confirmed that his legal firm handled the said civil suit. He stated the appellant had approached him and offered his services to serve the said writ of summons on SP3. He pointed out that on 15 July 1996, SP3 applied to set aside the bankruptcy order made against him but was not successful.

At the close of the prosecution's case, the learned sessions court judge found that the prosecution has proved its case beyond reasonable doubt on D the main charge and also the alternative charge and ordered the appellant to enter on his defence on the main charge. In his evidence, the appellant stated that the affidavit of service (exh P3) was prepared by Messrs Murthi & Partners and he signed it on 4 April 1987. He then pointed out that on 13 April 1987, ie, the date as stated in the main charge, he did not give any E evidence in the High Court, Kuala Lumpur as alleged therein. With regards to the service of the writ of summons, he related that at about 12 midnight on 29 January 1987 he left Klang in his own vehicle for Kota Bahru accompanied by a couple of friends including one Srivaji a/l Kamachi (SD2) and arrived there at about 9.30am the following day, ie, 30 January 1987. At about 10.30am he went to SP3's office together with SD2 by entering F the backdoor of the LUTH Building but found that the door to SP3's office was locked. They then went for a drink. He returned at about 11.30am with SD2 and met SP3 who was standing outside his office. Upon informing the purpose of his visit, SP3 refused to accept service of the writ of summons. He then left the writ of summons on the floor in front of the office door and left. The appellant stated that he now knew 30 January 1987 was a Friday G and admitted that the word Monday stated in his endorsement on the back of the writ and his affidavit is erroneous. He however denied that he has sworn a false affidavit as alleged.

At the close of the defence case, the learned sessions court judge, pursuant to s 158 of the Criminal Procedure Code ('CPC'), amended the H charge to read as follows:

> TUDUHAN PINDAAN OLEH MAHKAMAH
>
> Bahawa kamu pada 4 April 1987 jam 11 pagi di No 39 Dato Hamzah, Klang telah dengan sengaja mereka keterangan palsu untuk digunakan dalam prosiding Sivil No C1–23–3323–86 di mana keterangan palsu tersebut telah dibuat dalam satu afidavit yang diikrar oleh kamu dan kamu telah menyatakan I dalam afidavit perkataan-perkataan yang digariskan dalam lampiran A dan oleh demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah cabang pertama kepada s 193 Kanun Keseksaan.

Section 158 of the CPC read:

> (1) Any court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

The notes of proceedings recorded by the learned sessions court judge show that the amended charge was read and explained to the appellant and he maintained his plea of not guilty. The notes also show that counsel for the appellant requested that he be allowed to recall witnesses but that application was turned down. The learned sessions court judge then went on to find the appellant guilty of the charge as amended and sentenced him to ten months' imprisonment.

At the appeal counsel for the appellant raised three issues, namely:

(i) the credibility of SP3.

(ii) that the appellant has been wrongly charged under s 193 of the Code; and

(iii) the refusal of the learned sessions court judge to allow him to recall witnesses after amending the charge at the close of the defence case.

Section 193 of the Code reads:

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Section 191 of the Code reads:

> Whoever, being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.

Section 192 of the Code reads:

> Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person, who, in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said 'to fabricate false evidence'.

Section 193 of the Code is a punishment provision. That provision specifies the punishment which can be inflicted for offences described in ss 191 and

192 of the Code, ie giving false evidence and fabricating false evidence, respectively. In dealing with s 191 of the Indian Penal Code which is in pari materia with our s 191 of the Code, *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) at p 799 states the offence involves three ingredients, namely:

(i) a person must be legally bound (a) by an oath, or any express provisions of law, to state the truth, or (b) to make a declaration upon any subject;

(ii) he must make a false statement;

(iii) he must know or believe it to be false, or must not believe it to be true.

In dealing with s 192 of the Indian Penal Code which is in pari materia with our s 192 of the Code, *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) at p 809 states the section deals with fabricating false evidence and 'the wording of this section is so general as to cover any species of crime which consists in the endeavour to injure another by supplying false data upon which to rest a judicial decision' and that the following are the ingredients of the offence, namely:

(i) (a) causing any circumstance to exist, or (b) making a false entry in a book or record, or (c) making a false document containing a false statement;

(ii) that such circumstance, false entry or false statement must have been intended to appear in evidence in (a) a judicial proceeding, or (b) a proceeding taken by law before a public servant or an arbitrator;

(iii) that it was intended that such circumstance, false entry or false statement so appearing in evidence, might cause any person, who in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion;

(iv) the formation of opinion should be touching any point material to the result of such proceeding.

The main charge against the appellant is under s 193 of the Code, viz, the offence of giving false evidence in the said civil suit, upon which the learned sessions court judge at the close of the prosecution's case found was proved beyond reasonable doubt and hence called upon the appellant to enter on his defence. As discussed earlier, SP3 denied having been served with the writ of summons at his office in the LUTH Building, Kota Bharu on 30 January 1987 as his office was closed, it being a Friday and a public holiday. Furthermore the affidavit of service (exh P3) stated that 30 January 1987 was a Monday whereas that day was a Friday. It is my view that the learned sessions court judge must have called for the defence on the basis that he believed the prosecutions' witnesses, especially SP3 and SP4 which would lead to the conclusion that the affidavit of service contained a false statement, viz that the writ of summons was served on SP3 at his office in the LUTH Building, Kota Bharu on 30 January 1987 whereas the evidence shows otherwise.

In *Baban Singh v Jagdish Singh* AIR 1967 Cri LJ 6 (SC), in dealing with ss 191 and 192 and also 199 of the Indian Penal Code, the Supreme Court held that where a false affidavit is sworn by a witness in a proceeding before a court the offence would fall under s 191 and s 192. It is the offence of giving false evidence or of fabricating false evidence for the purpose of being used in a judicial proceeding. In that case, Hidayatullah J said (at p 8):

> The difference between ss 191 and 199 is this: Section 191 deals with statements and declarations falsely made by a person legally bound by an oath or by an express provision of law to state the truth. Section 199 deals with statements and declarations made voluntarily provided they are capable of being used as evidence and which the court is bound to receive as evidence.
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> The matter has to be to be considered from three stand points. Does the swearing of the false affidavits amount to an offence under s 199, Indian Penal Code or either s 191 or 192, Indian Penal Code? If it comes under the two latter sections, the present prosecution cannot be sustained. Section 199 deals with a declaration and does not state that the declaration must be on oath. The only condition necessary is that the declaration must be capable of being used as evidence and which any court of justice or any public servant or other person, is bound or authorized by law to receive as evidence. Section 191 deals with evidence on oath and s 192 with fabricating false evidence. If we consider this matter from the standpoint of s 191, Indian Penal Code, the offence is constituted by swearing falsely when one is bound by oath to state the truth because an affidavit is a declaration made under oath. The definition of the offence of giving false evidence thus applies to affidavits. The offence may also fall within s 192. It lays down, inter alia, that a person is said to fabricate false evidence if he makes a document containing a false statement intending that such statement may appear in evidence in a judicial proceeding and so appearing in, evidence may cause any person who, in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding. When Baban Singh and Dharichhan Kuer made declarations in their affidavits which were tendered in the High Court to be taken into consideration, they intended the statements to appear in evidence in a judicial proceeding, and so appearing, to cause the court to entertain an erroneous opinion regarding the compromise. In this way their offence came within the words of ss 191/192 rather than s 199 of the Indian Penal Code. They were thus prima facie guilty of an offence of giving false evidence or of fabricating false evidence for the purpose of being used in a judicial proceeding.

Looking at the above provisions and the case referred to, I am of the view that the main charge preferred against the appellant under s 193, of the Code in principle was correct but looking at the case for the prosecution, I would have thought that the facts show more a case of fabricating false evidence as described in s 192 of the Code rather than a case of giving false evidence as described under s 191 of the same. The affidavit of service sworn by the appellant (exh P3) is clearly a declaration made under oath. The appellant would be committing the offence of fabricating false evidence if that affidavit contains a false statement intending that such statement may appear in evidence in a judicial proceeding and so appearing to cause the

court to entertain an erroneous opinion, viz, that final judgment can be entered against SP3 as the writ of summons was served on him on 30 January 1987 and he failed to enter appearance after the time limited for appearing, which is 12 days from the date of service pursuant to O 12 r 4 of the Rules of the High Court 1980 ('the RHC'). Under the RHC, final judgment as such can be entered under O 13 r 1(1). It reads:

> Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

A question which needs to be determined at this appeal is whether the learned sessions court judge was correct in ruling that the prosecution had proved its case beyond reasonable doubt when he ordered the appellant to enter his defence. The difficulty faced here in this appeal is that this case was heard by three successive sessions court judges. The notes of proceedings show that a total of seven witnesses gave evidence during the prosecution's case. The learned sessions court judge who heard this case at the outset stopped at witness number six, ie, MS Murthi (SP6) who was then in the midst of being cross-examined. As to why she did hot continue to hear the case is not clear from the appeal record. The succeeding learned sessions court judge took over from where she left and partly heard the evidence given by SP6. He then went on to hear the evidence of SP3 who was recalled for further cross-examination, which right to do so, on record, was allowed by the first learned sessions court judge. He then heard the evidence of SP7, the investigation officer of the case after which the prosecution closed its case. After hearing the submissions of the deputy public prosecutor and counsel for the appellant, the succeeding learned sessions court judge ruled as follows:

> Setelah mempertimbangkan keterangan yang telah dikemukakan serta penghujahan kedua-dua pihak, saya memutuskan pendakwaan telah berjaya membuktikan kedua-dua pertuduhan terhadap OKT tanpa keraguan yang munasabah. Bagaimanapun, saya hanya mengarahkan OKT untuk membela diri terhadap pertuduhan pertama sahaja.

The proceedings were then adjourned to another date. When the matter came up for continued hearing, yet another succeeding learned sessions court judge presided over the matter. What happened to his predecessor, ie, the second learned sessions court judge is not clear from the appeal record. At the close of the defence case, the third learned sessions court judge amended the main charge to one of fabricating false evidence (reproduced earlier) which was read and explained to the appellant who maintained his plea of not guilty. Counsel for the appellant then made an application to recall witnesses but that was refused by the learned session court judge. The learned sessions court judge went on to find the appellant guilty and convicted him.

Procedurally, there is nothing wrong for a succeeding sessions sessions court judge to act on the evidence so recorded by his predecessor and to

continue from the point where it had been left behind by him. Section 281 of the CPC meet such a situation and it reads: A

> Whenever any magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his successor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial: B
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> Provided as follows:
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> (a) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard; C
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the magistrate before whom the conviction was had, if that court is of the opinion that the accused has been materially prejudiced thereby, and may order a new trial. D

In *Oh Kong Seng v Public Prosecutor* [1976] 1 MLJ 143 at p 144, Ajaib Singh J (as he then was) was of the view that such a provision should be exercised with caution. He said (at p 144):

> The provision of s 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or less formal or is largely uncontroversial and where the credibility of any material witness is not involved. E F G

In the instant case the evidence of SP3, without which there would have been no case to answer, was heard partly by the first learned sessions court judge and subsequently by the second learned sessions court judge who then ordered the appellant to enter his defence. The notes of proceedings do not show that the second learned sessions court judge viewed the evidence adduced by the prosecution objectively before calling on the appellant to enter his defence. His notes also do not show that he conducted a maximum evaluation of the evidence adduced by the prosecution, following *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265 and *Arulpragasan all Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, before ruling that the prosecution had established the main charge and also the alternative charge against the appellant beyond all reasonable doubt. That was the then standard of proof required of the prosecution at the close of its H I

A case prior to the amendment made to s 180 of the CPC and which amendment came into force on 31 January 1997.

Upon perusing the evidence adduced by the prosecution, I am of the view that there are inconsistencies with regards to the whereabout of SP3 on the morning of 30 January 1987. The third learned sessions court judge B had not seen or heard the prosecution's witnesses but then his grounds of decision also do not seem to reflect that he has observed such inconsistencies or taken account of material circumstances or probabilities before finding the appellant guilty on the amended charge.

The appellant stated in his affidavit of service that the writ of summons C was served on SP3 at about 11.45am on 30 January 1987 and it is the prosecution's case that this is false. SP7, the investigation officer of the case said he was informed by SP3 that the latter was at Istana Dusun, Pasir Mas on that date. SP7 claimed that SP3 did show him his diary (exh P5) wherein for the date 30 January 1987 there was an entry relating to an UMNO branch committee meeting at 9.30am at Pasir Mas and another entry, but D deleted, relating to a shooting competition for one 'DYTM of Brunei'. SP7 however admitted he did not investigate further as to whether SP3 did attend such a meeting.

In his evidence, SP3 denied being served with the writ of summons on 30 January 1987. He went on to say that as 30 January 1987 was a Friday E and a public holiday, he would not have gone to his office. He would have been at his house in Pasir Mas and would have visited the mosque in Pasir Mas as he was then contending for the post of 'Naib Ketua Bahagian' in UMNO. He then said:

> Pada awal pagi saya berada di rumah dan kemudian pergi sembahyang Jumaat F dan kemudian itu balik ke rumah semula. Selepas itu saya menunggu kawan dari luar negeri. Pada waktu pagi, kawan saya datang, Ramli bin Ahmad.
>
> Ramli bincang dengan saya hendak pergi ke masjid mana untuk sembahyang.

SP3 agrees that he lives in Istana Dusun Green, Pasir Mas, Kelantan but G denied having received two letters of demand from Messrs Murthi & Partners written prior to the filing of the said civil suit against him which were sent to his home address. He also denied having received a copy of the judgment against him which was sent to his office address. In relation to his diary (exh P5), SP3 agreed there was no entry in his diary as to his whereabout on the morning of 30 January 1987. What transpired under H cross-examination when his diary was referred to him is as follows:

Q Pada pagi, ada apa-apa catitan di mana kamu berada?

A Tiada.

I Q Dari 8.00 pagi — 12.00 tengahari di mana berada?

A Di Pasir Mas.

Q Appointed tetap?

A Pagi itu pergi ke sempadan melalui Pasir Mas. Saya pergi dengan Pengeran Subri, adik Sultan Brunei. Saya bawa dia ke sana.

Kami pergi Thailand dan balik.

Q Boleh kemukakan passport untuk sahkan?

A Saya tidak pakai passport sebab sampai ke Golok, melalui aturan khas. Bukan border pass.

Q Siapa kendalikan aturan khas itu?

A Saya ikut mereka. Tak tahu siapa atur kemungkinan Imigresen.

Q Setuju dari 8.00 pagi bertolak?

A Lebih kurang 9.00 pagi. Balik dalam lebih kurang 12.00 tengahari.

Sampai rumah 12.00 lebih.

What transpired subsequently is the following:

Q In chief kata tunggu kawan dari luar negeri, 'siapa nama'.

A Pengiran Sufri.

Q Itu pagi atau petang?

A Saya lupa.

Q Setuju lupa dan apa?

A Mula-mula tunggu kawan saya Rosli Ahmad, lepas sembahyang Jumaat tunggu kawan Pengiran Sufri.

Q Setuju pagi tunggu kawan Ramli Ahmad, lepas sembahyang Jumaat tunggu Pengiran Sufri untuk ke Thailand, jadi pergi Thailand petang?

A Ya.

What can be seen from the above is that SP3 claimed he went to Thailand in the morning of 30 January 1987 with one Pengiran Sufri but later changed his story and said that that trip was made in the afternoon of the same day. In his evidence, SP4 stated on 30 January 1987 he was with SP3 at the latter's house between 9am and 5pm. After Friday prayers he had lunch with SP3 also at the latter's house. At about 3pm that day one Jeffri, who is an overseas acquaintance of SP3 came to the said house and they then went to Rantau Panjang. They returned after 5pm. He insisted that SP3 did not go his office that day it being a Friday and a public holiday.

In relation to the bankruptcy proceedings, SP3 admitted receiving a letter from the official assignee in 1992 regarding the adjudication order made against him. He claimed he made enquiries with the official assignee's office in Kota Bahru to find out which party was responsible for making him a bankrupt but as the information was not forthcoming he left it at that. Upon receiving the information that he wanted through SP5, which according to SP5 was in 1995, he made the police report. The police report was made on 12 September 1996.

What is clear, based on the main charge, is that the prosecution has to establish that SP3 was not in his office situated in the LUTH Building at about 11.45am on 30 January 1987 and hence would not have met the appellant for personal service of the writ of summons to be effected upon him. Without this piece of evidence, there would have been no case to answer. By ruling that the prosecution has at the close of the prosecution's case proved its case beyond reasonable doubt, it can be inferred that it is the finding of the learned sessions court judge that SP3 was not in his office on that morning of 30 January 1987 and hence would not have met the appellant and be served with or be left with a copy of the writ of summons as stated by the appellant in his affidavit of service. This finding would be that of the second learned sessions court judge who partly heard the evidence of SP6 and subsequently SP3 who was recalled for further cross-examination. Be that as it may, can the evidence adduced by the prosecution fit into the main charge framed against the appellant upon which he was called to enter his defence? That charge, from my reading, can be digested as follows:

(i) that on 13 April 1987 at the High Court (1), Commercial Division, Kuala Lumpur the appellant gave false evidence for the purpose of it being used in Civil Suit No C1–23–3323–86;

(ii) that the false evidence was made in an affidavit sworn by the appellant and filed in the said High Court (the affidavit was attached to the charge);

(iii) that the appellant stated in the affidavit that he did personally serve the writ of summons relating to the said civil suit;

(iv) that the appellant knows that the statement referred to in para (iii) above is false or does not believe it to be true.

In relation to the framing of a charge under s 193 of the Code, the commentary in *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) at p 835 read as follows:

> In framing a charge for giving false evidence, the charge should be precise. The charge should show the particular matter in respect of which the accused is put upon his trial; and only so much of the accused's statements ought to be set out as is necessary in order to show the particular false statements relied on by the prosecution. It should contain a distinct assertion with regard to each statement intended to be characterized as perjury. It should specifically state what words or expressions the accused is charged with having uttered, and in what respect they are supposed to be false. The precise words used by

the accused should be recorded, not merely the effect or a paraphrase of those words. A

In my opinion, the charge as framed in the instant case is not very precise. The affidavit (exh P3) was sworn by the appellant on 4 April 1987 and it was filed in court on 13 April 1987. The plaintiff in the said civil suit would seem to have entered final judgment pursuant to O 13 r 1(1) of the RHC. B That judgment order was signed by the senior assistant registrar on 13 April 1987. That, to the prosecution, would be the day the appellant committed the offence of giving false evidence at the High Court, Kuala Lumpur as stated in the main charge. From my reading, the charge seems to be erroneous under the circumstances and based upon that charge, the learned sessions court was not in a position to call upon the appellant to enter his C defence.

Anyway, as discussed earlier, what transpired after the appellant was called to enter on his defence is as follows:

(i) at the close of the defence case and after hearing the submissions, the D learned session court judge altered the charge to one of fabricating false evidence under s 193 of the Code which offence was committed when the affidavit was sworn before SP2 on 4 April 1997;

(ii) the charge as altered by the learned sessions court judge was read and explained to the appellant and he maintained his stand of not guilty; E

(iii) counsel for the appellant then applied to recall witnesses but that application was refused; the minutes of the learned session's court judge in relation to this is as follows:

> Melihat kepada pengubahan yang dibuat serta pengakuan tertuduh saya dapati perubahan ini tidak memerlukan pembelaan baru. Saya akan memberi F keputusan saya berdasarkan keterangan yang telah dikemukakan.

The minutes of the learned sessions court judge then show the following:

> Daripada penelitian keterangan saksi-saksi pendakwa tertutamanya keterangan pengadu saya mempercayai keterangan yang tertuduh tidak G pernah menyerah saman berkenaan ke atasnya pada 30 Januari 1987 seperti dinyatakan dalam afidavit tersebut. Saya mempercayai pada hari tersebut itu yang merupakan cuti am di Negeri Kelantan pengadu tidak berada di pejabatnya seperti dinyatakan oleh tertuduh. Sehubungan ini saya tidak mempercayai keterangan tertuduh atau saksinya bahawa mereka telah pergi ke Kota Bahru, Kelantan pada tarikh berkenaan dan berjumpa dengan pengadu H dan setelah pengadu enggan menerima saman tertuduh telah meletakkan saman tersebut di depan pejabat pengadu.
>
> Keterangan tertuduh selain dari tidak dipercayai juga tidak menimbulkan sebarang keraguan keatas kes pendakwa. Perkara-perkara penting dalam pembelaan seperti perbualan dengan pengadu tidak ditanya semasa pengadu disoal balas oleh itu boleh dianggap sebagai 'after-thought'. I
>
> Berdasarkan faktor di atas saya mendapati tertuduh salah atas tuduhan terhadapnya dan sabitkannya atas tuduhan tersebut.

Section 158 of the CPC, which has been reproduced earlier, clearly provides the court may at any time before judgment is pronounced alter or add to any charge. But according to Hashim J in *Public Prosecutor v Tan Kim Kang & Ors* [1962] MLJ 388, it is a course which should be adopted only with great caution. The learned judge said (at p 389):

> I would like to comment on the powers of the court under s 158 of the Criminal Procedure Code. Section 158 of the Criminal Procedure Code empowers a court to 'alter or add to any charge at anytime before judgment 'is pronounced'. It is permissible under that section to alter the charge after the defence has been called but it is a course which should be adopted only with great caution. I think a safer and better course would be to follow the provisions of s 173(h), (i) and (j) of the Criminal Procedure Code. It is quite clear from these three sub-sections that a President or a magistrate should make any alteration or amendment to the charge only at the close of the case for the prosecution.

The learned sessions court judge has deemed it fit to amend the charge to one of fabricating false evidence as described under s 192 of the Code and punishable under s 193 of the same. In his grounds of decision the learned sessions court judge said he altered the charge as he was of the view that the appellant did not give false evidence but made a false affidavit. He said:

> Melihat kepada keterangan dalam kes ini saya dapati pendakwaan terhadap tertuduh bukan kerana memberi keterangan palsu dalam prosiding mahkamah tetapi membuat satu afidavit yang palsu untuk digunakan dalam satu prosiding mahkamah. Oleh itu tuduhan yang lebih tepat ialah mereka keterangan palsu untuk digunakan dalam satu perbicaraan kehakiman.

I find nothing wrong with the exercise of such a discretion but what has surfaced arising from that is whether the learned sessions court judge was correct in summarily dismissing the application of counsel for the appellant to recall witnesses after the charge was amended. In his grounds of decision in relation to this, he said:

> Saya seterusnya mendapati tuduhan pindaan itu tidak memerlukan keterangan yang lanjut memandangkan ia adalah berdasarkan fakta yang sama dan oleh itu saya telah meneruskan dengan keputusan saya. Bagi mencapai keputusan dalam kes ini saya telah mengambil kira perkara yang paling menonjol iaitu hari penyerahan saman merupakan satu pelepasan am di Kelantan di mana semua pejabat akan ditutup pada hari itu. Melihat kepada hakikat ini saya tidak dapat menerima keterangan tertuduh bahawa ia telah menyerah saman di pejebat SP3.
>
> Satu perkara yang menimbulkan ketidakpercayaan saya terhadap keterangan tertuduh ialah apabila ia menyatakan keadaan di Kota Bharu adalah seperti biasa dimana banyak pejabat buka pada hari itu. Ini tidak mungkin berlaku kerana adalah biasa di mana-mana pada hari kelepasan am keadaan bandar akan lengang terutamanya di pejabat-pejabat swasta mahupun Kerajaan. Tertuduh juga telah mengakui ada berlaku kesilapan dalam afidavitnya terutama mengenai hari penyerahan.

> Selain dari tidak mempercayai keterangan tertuduh saya juga dapati keterangannya dan keterangan SD2 tidak menimbulkan apa-apa keraguan munasabah di atas keterangan saksi-saksi pendakwaan terutamanya keterangan SP3.
>
> Saya mempercayai keterangan SP3 yang ia tidak pergi ke pejabat dan berada di rumah pada 30 Januari 1987. Berdasarkan perkara ini saya telah dapati tertuduh bersalah atas tuduhan terhadapnya.

I am of the view it is wrong for the learned sessions court judge to just summarily reject the application of counsel for the appellant to recall witnesses. Section 162 of the CPC reads:

> Whenever a charge is altered or added by the court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witnesses who may have been examined, and may also call any further evidence which may be material.

From my reading, s 162 of the CPC seems to be a mandatory provision, viz, that the accused *shall* be allowed to recall any witnesses. In my opinion, what the learned sessions court judge should have done is to enquire into the reason for the application of counsel for the appellant to recall witnesses and allow him to identify to the court which witnesses he wants to recall instead of summarily dismissing the application as reflected in the notes of proceedings. Since it is a mandatory section, I would think that the trial is vitiated as a result of the refusal by the learned sessions court judge without enquiring into the reason for the application.

Another matter reflected in the learned sessions court judge's grounds of decision which attracted my attention is the fact that, he has imported personal knowledge which is not backed by evidence in his attempt to reinforce the finding of the court at the close of the prosecution's case, viz, that since it was a public holiday in Kelantan on 30 January 1987, all offices are closed and hence he cannot accept the claim of the appellant that he served the writ of summons on SP3 on that day. He also went on to say that he cannot accept the appellant's claim that on that day the situation in Kota Bharu was 'biasa' as, on all public holidays, the town will be quiet and there will be no activity in the offices of the private sector as well as Government offices. He noted further that the appellant admitted that he made a mistake in his affidavit by stating that 30 January 1987 was a Monday whereas it was actually a Friday. In *Ganapathy a/l Rengasamy v PP* [1998] 2 MLJ 577 at p 585, Shaik Daud JCA said:

> It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law should not brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in *Mat v Public Prosecutor* [1963] MLJ 263 is still good law today as it was then. This was followed by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169.

I have for the following reasons allowed the appeal by setting aside the conviction and acquitted and discharged the appellant, namely:

(i) the main charge preferred against the appellant was wrongly framed as the prosecution's case do at all show that the appellant gave evidence on 13 April 1987 at the High Court, Kuala Lumpur and that being so, the appellant should not have been called upon to enter his defence;

(ii) further, there is nothing to show that the learned sessions court judge has carried out a maximum evaluation of the evidence adduced by the prosecution, especially in relation to the evidence of SP3 when he ruled that the prosecution had proved its case beyond reasonable doubt at the close of its case;

(iii) the summary dismissal of the appellant's application to recall witnesses when the charge was amended is erroneous and has occasioned a miscarriage of justice.

Appeal allowed.

Reported by Lim Lee Na